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State of New York Public Employment Relations Board Decisions from April 15, 1986

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF BUFFALO,

Respondent,

-and- CASE NO. U-8017

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 650,

Charging Party.

SARA O. NAPLES, ESQ. (FLORA MILLER SLIWA, ESQ., of Counsel), for Respondent

SARGENT & REPKA, P.C. (NICHOLAS J. SARGENT, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by the American Federation of State, County, and Municipal Employees, Local 650 (Local 650). It recites that the Common Council of the City of Buffalo adopted a resolution on January 22, 1985, designed to resolve a negotiation deadlock between Local 650 and the City of Buffalo (City), which, inter alia, provided:

4. HEALTH AND LIFE INSURANCE

a. Employees who voluntarily waive dental coverage shall receive $12.50 per month (up to a maximum of $150.00 per year), payable on December 15.

b. Employer may seek bids for medical and dental coverage or may self-insure, in

> accordance with finding of Factfinder on Issue No. 7.1/

Local 650 then complained that it was unlawful for the Common Council to have adopted this language and, on March 5, 1985, the Common Council rescinded it. The charge states that the City considers the rescission a nullity and "has asserted its freedom to implement the two rescinded provisions . . . ." Moreover, according to the charge, the City has implemented the first of the provisions. The charge concludes:

> Based upon the foregoing, the respondent has interfered with, restrained and coerced employees in the unit appropriate for collective bargaining represented by Charging Party, and has also failed to negotiate in good faith with the recognized representative, the Charging Party.

The record before the Administrative Law Judge (ALJ) consists of a stipulation of facts and joint exhibits. It includes the allegations, but not the conclusion, contained in the charge. It does, however, indicate that the date of the first legislative resolution was January 14, 1985, and not January 22, 1985.

1/That finding states:

> Such alternate coverage will pay the full cost of all treatment, services, or other benefits as are now enjoyed under the present plans, and it will not add to the employee's health costs for medical.
>
> Further, if the savings with the bidding or self-insurance process exceeds 25% of the current total premium, the EMPLOYER shall apply 10% of these savings to improving health insurance benefits in areas agreed to by both parties.

The stipulation also states relevant facts not contained in the charge. Local 650 and the City had been parties to a collective bargaining agreement covering the period July 1, 1982 through June 30, 1984. After an impasse was reached between them in their negotiations for a successor agreement, this Board appointed a mediator and then a fact finder. The fact finder issued a report which, inter alia, recommended the changes in health and life insurance that were subsequently incorporated into the January 14, 1985 resolution of the Common Council. The fact finder's report was not accepted and the City's mayor forwarded a copy of that report to the Common Council with his recommendation that it be adopted except for four modifications. His proposed modifications did not address the health and life insurance recommendation of the fact finder.

The Common Council conducted public hearings on the merits of the mayor's proposal. Local 650 participated in the legislative hearing addressing the four issues raised by the mayor and raising a fifth issue on its own. However, it too did not address the health and life insurance recommendation.

At the legislative hearing, both the City and Local 650 informed the Common Council that their understanding of County of Niagara v. Newman, 104 A.D.2d 1, 17 PERB §7021 (4th Dep't 1984), precluded the Common Council from diminishing any benefits contained in the parties' previous collective

bargaining agreement. It is stipulated that although Local 650 did not specifically address the proposal of the fact finder relating to health and life insurance, it did not agree to the change imposed by the Common Council.

In its Memorandum of Law to the ALJ, Local 650 stated that the issue was:

> May a legislative determination, imposed pursuant to §209(3)(e) of the Civil Service Law, change the terms and conditions of an expired collective bargaining agreement, whether or not to the benefit of the bargaining unit employees?

It argued that this question must be answered in the negative. Noting that this Board stated in County of Niagara, 16 PERB ¶3071 (1983), at p. 3116 n. 9,[2/] that an employee organization "may consent to the issuance of a legislative determination . . .", it argues that this should be understood to mean:

> [T]he consent of the employee organization is to the terms of the legislative determination, not the issuance thereof. Thus, any participation in interest arbitration [or legislative hearing] to resolve an impasse in negotiations by an employee organization, does not constitute consent by the organization to the interest arbitration [or legislative hearing]. The consent of the employee organization must be to the arbitration award [or legislative determination] becoming effective.

The City, in its Memorandum of Law to the ALJ, argued that Local 650's participation on the merits in the

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[2/] Confirmed, County of Niagara v. Newman, supra.

legislative hearing constituted a consent to the Common Council's exercise of jurisdiction over the negotiation deadlock. It further argued that the disposition of the health and life insurance issue by the Common Council did not diminish any benefits provided by the parties' expired agreement. Finally, it argued that, having resolved the deadlock by its legislative determination of January 14, 1985, it lacked the power to reopen the matter and change that legislative determination.[3/]

The ALJ held that Local 650 did not consent to a legislative determination. She found that it had consistently taken the position that §209-a.1(e) of the Taylor Law precluded the Common Council from imposing changes in contractual benefits and concluded that its participation at the hearing by making a presentation on the merits of some of the issues did not constitute a waiver. She further found that it did not waive its right to object to a violation of §209-a.1(e) by objecting to some but not other changes made by the Common Council in its legislative determination.

The ALJ determined that the City's argument that the health and life insurance changes do not diminish benefits afforded under the expired agreement is irrelevant because

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[3/]The City made an additional argument, to wit, that the prior collective bargaining agreement between the parties had not expired. This argument, like the others made by the City, was rejected by the ALJ. It was raised in the exceptions, but was withdrawn by the City during oral argument.

§209-a.1(e) makes no distinction between changes which may be beneficial and changes which may be to the detriment of unit employees. Finally, she rejected the proposition that the Common Council was without power to rescind its determination of January 14, 1985.

Having rejected the City's arguments, the ALJ found that it violated §209-a.1(e) of the Taylor Law "when, through the action of its legislative body and its implementation by the executive branch, it changed the terms of the health insurance provisions of the parties' expired collective bargaining agreement in and after January 1985." The ALJ also found the City's conduct to be violative of §209-a.1(d) of the Taylor Law.[4/]

The matter now comes to us on the exceptions of the City. It reasserts the positions argued before the ALJ:[5/] (1) Local 650's participation on the merits in the legislative hearing constituted a consent to the Common Council's exercise of jurisdiction over the negotiation deadlock; (2) its conduct in reliance upon the legislative

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4/The ALJ determined that the City's conduct did not violate §209-a.1(a) of the Taylor Law. Local 650 has filed no exception to this part of her decision.

5/The City had previously made a motion that the matter be remanded for further evidence. Finding that the proffered evidence "would at most have some relevance to the remedial order", we denied the motion, but left open the possibility that additional information might be solicited, should we affirm the ALJ's finding of a violation. City of Buffalo, 19 PERB ¶3005 (1986). The possible need for such a reopening of the record has been resolved by an additional stipulation of the parties.

determination of January 14, 1985 was sanctioned by the Taylor Law; (3) the subsequent legislative determination is of no legal consequence because, having performed its Taylor Law function under §209.3(e) of the Taylor Law, the Common Council was functus officio. The City also argues (4) that its conduct was consistent with the legislative determination even if the jurisdiction of the Common Council had been limited by the mutual expressions of the City and Local 650 before the Common Council that it "lacked the power to diminish any of the benefits contained in the previous collective bargaining agreement." This argument is based upon the proposition that the changes relating to health and life insurance did not diminish any such benefits.

Since the ALJ issued her decision herein, Local 650 has changed attorneys. Its current attorney does not rely upon the arguments which persuaded the ALJ. According to his analysis, the City violated §209-a.1(d) and (e) of the Taylor Law because it did not accept the legislative determination of March 5, 1985. Local 650's attorney contends that the March 5, 1985 legislative action of the Common Council was a valid exercise of legislative authority by the Common Council and that it effectively rescinded the authorization for changes in health and life insurance contained in its earlier determination. Thus, according to Local 650's attorney, we need not reach the issue whether the earlier determination was a proper one by reason of having been consented to by Local 650.

At the oral argument, Local 650's attorney stated that he reads the charge as being limited to the conduct of the executive branch of the City. He reasoned that the filing of the charge a week after the second legislative determination shows that it complained about the failure of the City's executive branch to comply with the second legislative determination. Local 650's current attorney has not attempted to amend the charge; rather, he has merely indicated his interpretation of it.[6/]

Our review of the record persuades us that the charge was properly understood by the ALJ. On its face, it complains about the conduct recited, which includes the first legislative determination. Furthermore, Local 650's brief to the ALJ, which was drafted by the attorney who had prepared the charge, was clearly directed to the events of January 14, 1985, and immediately thereafter. Accordingly, we treat the current Local 650 argument as an alternative theory to justify relief. We therefore find it necessary to address the issues raised by the City's exceptions to the decision of the ALJ,

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6/He is aware, however, that if we accept his interpretation, we would be compelled to reverse the decision of the ALJ insofar as it finds a violation with respect to the action of the Common Council on January 14, 1985; with respect to the executive branch of the City between January 14, 1985 and March 5, 1985; and with respect to the second paragraph of the health and life insurance resolution completely. The first two of these findings of the ALJ would have to be reversed because they deal with matters not encompassed by the charge, the last because there is no evidence that the City ever effectuated the second paragraph of the health and life insurance resolution.

which dealt with Local 650's original theory as well as those raised by Local 650's current theory.

The first issue raised by the City's exceptions is whether Local 650's participation, on the merits, in the legislative hearing waived its right to object to changes wrought by the legislative determination. In County of Niagara, supra, we noted (at p. 3116 n. 9) that

> an employee organization may consent to the issuance of a legislative determination by a legislative body or to a determination by a public arbitration panel, in which event it would waive its right to require the public employer to abide by the terms of the expired agreement.

We elaborated on this point in City of Kingston, 18 PERB ¶3036, at p. 3076 (1985), saying that participation by a union on the merits "might constitute a waiver of its objection to the process." We noted that where a union does not waive its objection to the process,[7/] that process "could be allowed to run its course up to, but not including, the point where the award is put into effect," because that last step would be contingent upon the union's consent. Finding that this would give a union an unfair advantage over a public employer by knowing the terms of the award before having to decide whether to be bound by it, we concluded that it would not effectuate the purposes of the Taylor Law for us to activate that process

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7/In that case we were dealing with the process of interest arbitration, but the principle enunciated applies equally to legislative determinations.

if there had not been an earlier waiver by the union. These decisions make clear that a union must make its position known at the commencement of the legislative hearing process. It may not participate in the process on the merits and then await the results of the process before deciding whether and to what extent to be bound by it.[8/]

Here, the parties' stipulation expressly states that Local 650 joined with the City in advising the Common Council that it "lacked the power to diminish any of the benefits contained in the previous collective bargaining agreement." We understand this to constitute a joint submission by the parties to the Common Council, authorizing it to make changes in the prior collective bargaining agreement to the extent that such changes do not diminish benefits.[9/]

[8/] If, however, a public employer chooses to activate the process on its own, notwithstanding a union's objection to the process, it takes the risk of letting the union decide which terms of a legislative determination it will accept.

[9/] This joint submission was based upon the parties' understanding of County of Niagara v. Newman, supra, that such was the power of the Common Council as a matter of law. The Appellate Division decision stated that a legislative determination could not diminish employee rights. That statement was appropriate on the facts of Niagara. The changes wrought in that case had diminished employee rights (See footnote 2 of the ALJ decision at 15 PERB ¶4649 (1982).

The statute goes further and prohibits all changes except, as noted in our Niagara County decision, where the union consents to the process. The limited consent here, embodied in the joint submission to the Common Council, is valid, notwithstanding its genesis as an overly strict reading of the the court's decision.

This brings us to the question whether the changes authorized by the legislative determination of January 14, 1985 constituted a diminution of benefits. The first modification permits unit employees to sell their dental insurance coverage to the City for a specified price. The choice whether or not to do so was left with the individual employee. On the record before us we do not find that the City diminished contractual benefits under the expired collective bargaining agreement by affording this option to unit employees.

The second modification permits the City to seek alternative medical and dental coverage or to self-insure in accordance with the finding of the fact finder. The language of this modification, especially with its incorporation of the conditions imposed by the fact finder, does not establish a diminution of contractual benefits. As no such substitute insurance program has been introduced, it is premature to ascertain whether an actual change has done so.

Accordingly, we reverse the decision of the ALJ and hold that the City did not violate §209-a.1(d) or (e) of the Taylor law by virtue of the legislative determination of January 14, 1985, or the action of the executive branch of the City pursuant thereto. This leaves the question whether the City's conduct became violative of the Taylor Law after the legislative determination of March 5, 1985. The City

argues that the second determination is a nullity because the Common Council was performing a special Taylor Law function rather than a normal legislative function when it issued its first determination. According to the City's executive, the Common Council had no inherent legislative authority to reverse itself in this connection and none may be found in the Taylor Law.

We agree that a legislative determination under §209.3(e) is a special Taylor Law function rather than a normal legislative one. The purpose of such a determination is to afford finality where the parties reach a deadlock in negotiations.[10/] It does not follow, however, that no changes may be made by the legislative body. It is useful to analogize such legislative determinations to arbitration awards because, in arbitration, too, there is a public policy that an award should provide finality in the resolution of disputes.[11/]

10/The provisions of the Taylor Law relating to legislative hearings and legislative determinations were added by L. 1969, c. 24, §6. They were recommended by the Taylor Committee in a part of a report entitled "Finality in Impasse Procedures." (Governor's Committee on Public Employee Relations, Report of January 23, 1969, pp. 3-5.) After enactment, their significance was noted in the 1969 report of the Select Joint Legislative Committee on Public Employee Relations (Legislative Document 1969 - Number 14) as "relating to the finality of agreements. . . ."

11/This is expressed in the narrowness of the opportunity for judicial review of an arbitration award afforded by CPLR §7511(b).

CPLR §7509 permits the modification of an award by an arbitrator. There are two significant restrictions. The first is that the modification must be upon the application of a party within 20 days of the delivery of the award to the applicant. The second, by cross-reference to CPLR §7511(c), is that the grounds for modification are limited to (1) a miscalculation of figures or mistake in the description of a person, thing, or property, (2) elimination of a part of an award dealing with a matter not submitted to the arbitrator, and, (3) a correction as to a matter of form not affecting the merits of the controversy.

We find that similar restrictions are appropriate for modifications of a legislative determination. They permit the prompt correction of gross errors while reasonably protecting the finality principle. Applying them here, we find the Common Council acted promptly to modify a determination in response to an application by Local 650 which was made only two days after that determination. We further find that the grounds for the modification of the first legislative determination was that the Common Council was persuaded by Local 650 that the action it had earlier taken went beyond the power bestowed upon it by the parties' submission in that it diminished contract benefits.

This finding is complicated by our earlier conclusion that the record before us does not support a determination that the change diminishes employee benefits. The test in

reaching that earlier conclusion was our own view of the preponderance of the evidence, with the burden of proof falling upon the charging party. With respect to the issues raised by the modification of the legislative determination, the test is whether the legislative body acted arbitrarily. In this sense, a legislative determination issued upon a submission is like an arbitration award that may not be set aside because of a mistake of fact or law unless the error is so gross as to establish fraud or misconduct.[12/] Such is not the case here.

Having found the second legislative determination to be binding upon the parties, our analysis of Local 650's original charge brings us to the same place as its current attorney does with his new theory. Does the failure of the City to comply with the second determination constitute a violation of §209-a.1(d) or (e) of the Taylor Law?

Clearly, the City's failure to comply with the second legislative determination does not constitute a violation of CSL §209-a.1(e) of the Taylor Law, which prohibits a public employer from changing the terms of an expired agreement until a new agreement is negotiated. Here, the change in health and life insurance that was effectuated by the City took place pursuant to the legislative determination of January 14, 1985,

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12/See Dahan v. Luchs, 92 A.D.2d 537 (2d Dep't 1983).

and, as we have held, that determination superseded the expired agreement because it was authorized by the parties' submission to the Common Council. The City's executive made no further change after the legislative determination of March 5, 1985, and its refusal to reorder the status quo ante does not violate §209-a.1(e) of the Taylor Law.

The question whether the City's failure to comply with the second legislative determination constitutes a violation of §209-a.1(d) of the Taylor Law requires a different answer. For these purposes the legislative determination should be seen as the equivalent of a collective bargaining agreement.[13/] Thus, if the charge is seen as an attempt to enforce the terms of that agreement equivalent, there would be no violation.[14/] But we do not see the charge this way. Rather, we see it as complaining that the City had repudiated the legislative determination.

Both this Board and the courts have distinguished between charges which complain that a party has failed to comply with the terms of an agreement and charges which

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13/In a decision not appealed to this Board, the Director of Public Employment Practices and Representation has held that a legislative determination which resolves a negotiation deadlock would be the equivalent of a collective bargaining agreement for the purposes of contract bar. County of Erie, 8 PERB ¶4007 (1975). In County of Suffolk, 12 PERB ¶3014 (1979), we held that an interest arbitration award is a substitute for an agreement.

14/See §205.5(d) of the Taylor Law and St. Lawrence County, 10 PERB ¶3058 (1977).

complain that a party has repudiated an agreement. For example, in Jefferson County Board of Supervisors, 6 PERB ¶3031 (1973), we were confronted with a charge complaining that a public employer refused to fund the second year of a two-year contract. Noting, at p. 3064, that the charge did not present "a dispute as to interpretation of a term of a contract, where the employer acts under a claim of contractual privilege," this Board found a violation in that the employer was repudiating its agreement. The employer appealed our decision, arguing that we lack jurisdiction because the dispute involved only a legal question as to the interpretation of the agreement. The Appellate Division rejected this argument, holding that we had jurisdiction over the complaint that the employer repudiated the agreement by refusing to appropriate money to finance it.[15/]

More recently, an ALJ dismissed a charge complaining that a school district had refused to pay an agreed-upon salary increase in violation of §209-a.1(d) of the Taylor Law. The District had denied that there was such an agreement and the ALJ said: "the dispute is really one that involves the interpretation and enforcement of an agreement . . . ." Copiague UFSD, 13 PERB ¶4542, at p. 4587 (1980). We reversed

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15/Jefferson County Board of Supervisors v. PERB, 44 A.D.2d 893, 7 PERB ¶7009 (4th Dep't 1974). The Appellate Department reversed another aspect of the decision of this Board, aff'd, 36 N.Y.2d 534, 8 PERB ¶7008 (1975).

this decision on the ground that the District's denial of the existence of an agreement raised the issue whether it was repudiating an agreement. We said (13 PERB ¶3081, at p. 3129 [1980]):

> The repudiation of a final agreement is a violation of the duty to negotiate in good faith [footnote omitted]. It is clear that if there are to be harmonious and cooperative relations between public employers and the organizations representing their employees, neither side may be permitted to repudiate its agreements. Such a repudiation, if it occurred here, would be inconsistent with the requirements of good faith negotiations.

The principle enunciated in these cases applies here. Accordingly, we find that the City has violated §209-a.1(d) of the Taylor law by repudiating its obligation -- imposed by the second legislative determination, which rescinded the first determination with respect to health and life insurance benefits -- to cease and desist from offering unit employees the opportunity to sell their dental insurance coverage to it. We also find a violation with respect to the modification authorized by the first legislative determination dealing with alternative medical and dental insurance coverage. It is irrelevant that the City has only effectuated the first part of the January 14, 1985 determination. It has repudiated the second legislative determination, which for these purposes is the equivalent of a collective bargaining agreement, with respect to both parts.

NOW, THEREFORE, WE ORDER the City to cease and desist from repudiating the determination of the Common Council of March 5, 1985.[16/]

DATED: April 15, 1986
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

16/This remedial order is circumscribed. We find it appropriate in view of the narrow scope of the violation found herein and of the stipulation submitted by the parties to us in lieu of a reopening of the record. See footnote 5 supra.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF HEMPSTEAD,

Respondent,

-and- CASE NO. U-7842

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 830, AFSCME, LOCAL 1000, AFL-CIO,

Charging Party.

W. KENNETH CHAVE, JR., ESQ. (KEVIN P. McDERMOTT, ESQ., of Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, P.C. (JOHN R. MINEAUX, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Town of Hempstead (Town) to a decision of an Administrative Law Judge (ALJ) that the Town violated §209-a.1(a) of the Taylor Law. The violation found was that the Town Superintendent of Sanitation told a unit employee, whose request for a task reassignment had been denied by his supervisor, that the matter would have been handled differently if the employee had not brought the president of the Civil Service Employees Association, Local 830, AFSCME, Local 1000, AFL-CIO (CSEA) with him when he made his request.[1/]

[1/]The ALJ dismissed all the other specifications of the charge; no exceptions were filed by CSEA.

The Town argues that the statement attributed to the Superintendent[2/] was of no consequence and therefore could not constitute a violation of the Taylor Law. The Town's reason for this proposition is the absence of evidence that the Superintendent had any input into the supervisory decision to deny the request or that he knew why the request was denied. The Town further argues, relying upon New Paltz CSD, 17 PERB ¶3108 (1984), that, in any event, the Superintendent's statement should be excused.

In New Paltz, we found that statements by a representative of a public employer which might, under other circumstances, have established an intention to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Taylor Law, did not do so because they were an uncontrolled personal response to a provocation. The record herein affords no reason to apply the reasoning in New Paltz here.

The Town's argument that the Superintendent's statement is of no consequence assumes that the issue here involves the truth of the statement that the unit employee would have been afforded different treatment if a union official had not been brought in. Whether the presence of a union official did in

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2/There was a conflict between the testimony of the Superintendent and the unit employee as to what was said by the Superintendent. The ALJ resolved the credibility issue in favor of the unit employee. We find no reason to disturb this conclusion.

fact make a difference is not of the essence. The statement itself communicated to the employee that some requests would be given less favorable treatment by the Town if unit employees making such requests sought support from CSEA. Such a communication is inherently destructive of employee rights protected by §§202 and 203 of the Taylor Law and therefore violates §209-a.1(a) of that Law.[3/]

The Town also complains about the remedial order proposed by the ALJ. It contends that the order is unduly burdensome in that it requires the posting of a notice where merit was found in only one specification of the charge, other specifications having been dismissed.

The remedial order is one appropriate to a finding of a violation of §209-a.1(a) of the Taylor Law by reason of the Superintendent's statement. That the charge contained other allegations which were not supported by the evidence does not make the remedial order less appropriate for the violation found.[4/]

[3/]Compare UFT, Local 2 (Barnett), 15 PERB ¶3103 (1982), and State of New York, 10 PERB ¶3108 (1977).

[4/]The Town feels that the notice is inappropriate because it does not inform the employees that other specifications of the charge have been dismissed. In this regard the Town does not fully appreciate the reason for the posting. In any event, it is not prevented from posting a full copy of the ALJ's decision or a supplemental statement which accurately reports the disposition of the charge.

NOW, THEREFORE, WE ORDER:

1. that the exceptions be, and they hereby are, dismissed;
2. that the Town cease and desist from interfering with, restraining or coercing employees within the unit represented by CSEA in the exercise of their rights under the Taylor Law; and
3. that the Town sign and post the attached notice at all locations customarily used to communicate with unit employees.

DATED: April 15, 1986
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Hempstead within the unit represented by the Civil Service Employees Association, Local 830, AFSCME, Local 1000, AFL-CIO that the Town of Hempstead will not interfere with, restrain, or coerce unit employees in the exercise of their rights under the Public Employees' Fair Employment Act.

TOWN OF HEMPSTEAD

.....

Dated..... **By**.....
(Representative) (Title)

10307

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF NORTH CASTLE

Employer,

-and-

NORTH CASTLE WATER & SEWER DISTRICT EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 860,

-and-

TOWN OF NORTH CASTLE SEWER DISTRICT NO. 1,

-and-

TOWN OF NORTH CASTLE SEWER DISTRICT NO. 2,

-and-

TOWN OF NORTH CASTLE WATER DISTRICT NO. 1,

-and-

TOWN OF NORTH CASTLE WATER DISTRICT NO. 2,

Intervenors.

BOARD DECISION

AND ORDER

CASE NO. C-2938

RAINS & POGREBIN (BRUCE R. MILLMAN, ESQ., of Counsel), for Employer

SAL MISITI, for Petitioner

ROEMER & FEATHERSTONHAUGH, P.C. (WILLIAM M. WALLENS, ESQ., of Counsel), for Civil Service Employees Association, Local 860

This matter comes to us on the exceptions of the Civil Service Employees Association, Local 860 (CSEA) to an interim decision of the Director of Public Employment Practices and Representation (Director) holding that persons who work for the Town of North Castle Sewer District No. 1, the Town of North Castle Sewer District No. 2, the Town of North Castle Water District No. 1 and the Town of North Castle Water District No. 2 are jointly employed by the Town of North Castle (Town) and the Districts, and that they should therefore be excluded from a unit of Town employees represented by CSEA.[1/]

The decision was issued following a petition by the North Castle Water & Sewer District Employees Association (Association) to decertify CSEA as the representative of such employees and for its own certification in its place. At present, CSEA represents those employees in a unit of blue- and white-collar employees of the Town. Neither the Town nor the Districts have taken any position on the merits of the dispute.

The Director resolved the issue before him on the ground that the Taylor Law compels separate units because some employees work for the Town and others work for the Districts and Town as a joint employer.

[1/] 19 PERB ¶4001 (1986). It is an interim decision in that the Director has not yet determined the unit or units in which such persons should be represented in negotiations pursuant to the Taylor Law.

Having decided to deal with this issue initially, the Director did not afford the Association an opportunity to prove allegations that might justify a restructuring of the units on other grounds. The Director's decision was made on the basis of a record to which all parties had been granted an opportunity to submit allegations of fact. Only the attorney for the Town -- who subsequently indicated that he also was representing the Districts -- submitted allegations of fact, and neither of the other parties objected to these allegations. On that record, the Director determined that each of the four Districts was created by the Town pursuant to provisions of §190 of the Town Law as a special improvement.[2/] He further found that the Town Board had sufficient control of the budget and other affairs of the Districts so as to be a joint employer with them. Citing decisions of this Board,[3/] he held that employees of joint employers are entitled to be represented in a negotiating unit other than one which includes employees who work only for one of the entities that comprise the joint employer.

2/Section 201.6(a)(iv) of the Taylor Law specifies that special districts and improvement districts are public employers within the meaning of the Taylor Law. In general, the statutory provisions relating to special or improvement districts which function on a town level are set forth in Article 12 of the Town Law.

3/County of Orange, 14 PERB ¶3012 (1981); County of Schenectady, 14 PERB ¶3013 (1981); Albany County, 15 PERB ¶3008 (1982); County of Clinton, 18 PERB ¶3070 (1985).

The decisions cited by the Director all involve employees of sheriffs. The rationale for these decisions is most fully articulated in County of Clinton, supra, which explains the three standards for defining negotiating units that are set forth in §207 of the Taylor Law as follows (at p. 3153):

> The first community of interest standard clearly contemplates that a range of possible units would satisfy it. Accordingly, it must be evaluated on a relative basis. This is done by placing its implications in balance with the implications of the third standard. As noted by the joint employer in its brief, that standard "takes into consideration the administrative convenience of the employer and perhaps suggests that an excessive number of units might be undesirable." (Footnote omitted.) Thus, by its nature, it, too, contemplates a range of unit possibilities, with administrative convenience balanced against community of interest when the two standards point in opposite directions.
>
> The second standard is different. Where the employees all work for the same public employer, it can always be satisfied because the employer can always create a matching labor relations structure for itself. Accordingly, it is a variable factor to the extent that the public employer's current labor relations structure might have to be changed. But where there is a multi-employer unit, it can never be satisfied because there are no officials of the separate governments who function at the level of the unit with respect to the unit as a whole.

Our conclusion -- that the first and third standards lend themselves to a balancing test and the second standard does not -- is true with respect to employees of sheriffs' departments. Our review of the Town Law provisions relating to special and

improvement districts persuades us, however, that it is not necessarily true of all such districts.

Ever since the enactment of Chapter 634 of the Laws of 1932, the governance of most such districts has been vested in the town board of the town which created the district.[4/] Some districts, however, are governed by boards of commissioners. This is true, for example, of fire districts and other districts which adopted appropriate resolutions prior to June 29, 1933.[5/] But for the typical special or improvement district, it is the town board which is the appointing authority of employees.[6/] The record shows this to be the case here. In this, special and improvement districts are significantly different from sheriffs' departments in that sheriffs are the appointing authority of the employees of those departments.[7/] The significance of this is that, while special and improvement districts are public employers within the statutory definition of that term, they nevertheless lack any influence over the terms and conditions of employment of the employees. Indeed, their control over terms and conditions of employment is

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4/Town Law §61 and §190.

5/Town Law §61, §341.10 and Article 13.

6/Town Law §61.

7/County Law §652.2. Moreover, a sheriff is personally liable for the actions of his civil deputies. Reese v. Lombard, 46 N.Y.2d 904 (1979).

significantly less than that of town highway departments, the head of which is an elected town superintendent of highways. Nevertheless, this Board has held that highway department employees are properly placed in units of town employees.[8/]

The 1969 report of the Select Joint Legislative Committee on Public Employee Relations[9/] supports the proposition that town improvement and special districts are different from most other entities defined as public employers by the Taylor Law. Appendix E of that report contains a listing of public employers under the Taylor Law and specifies certain information about each type of public employer. Under the general heading of towns, it contains the following entry: "Town improvement or special districts (not a gov. unit)." It further states that the chief executive official of such districts is the town supervisor and their legislative body is the town board. The parenthetic statement "not a gov. unit" means that such districts do not exercise normal governmental functions. Rather, they are designed to facilitate the town government's provision of special services to areas less than the full territory of the town and to assess the costs of such services against the residents of the town who will benefit

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8/Town of Ramapo, 8 PERB ¶3057 (1975).

9/State of New York Legislative Document 1969 - No. 14.

from them, i.e., those who live in the special or improvement district.

We find further support for the proposition that negotiating units may be defined by this Board which transcend the lines of entities enumerated in §201.6(a) of the Taylor Law in the Taylor Committee Report.[10/] That document sets forth the legislative history of the Taylor Law. At page 55, it states:

> THERE ARE AT LEAST 8600 governmental employing entities in the State of New York the employees of which might conceivably desire to exercise the right of association for the purpose of negotiating collectively the terms of their employment and the handling of their grievances. These include 20 State Departments, the State University, 62 cities, 62 counties, 932 towns, 553 villages, 1199 school districts, 53 public authorities, 84 housing authorities, 5540 special districts, an unknown but large number of city departments, and 21 urban renewal agencies. Moreover, many of these entities run special installations (such as hospitals, prisons, etc.) the employees of which have a plausible community of interest in collective representation.
>
> To assume that a single mode of collective participation for the employees of all of these entities can or should be established by state law would exceed the limits of common sense. As a matter of fact, an extensive range of arrangements for that collective participation has developed out of experience in satisfying the interests of not only employees, but also employee organizations, government agency executives, and legislative bodies.

10/Governor's Committee on Public Employee Relations, Final Report, March 31, 1966.

Here, the report refers not only to the entities which constitute public employers within the meaning of the Taylor Law, but also departments of some such public employers. The report then indicates that the employees of these entities have various plausible communities of interest, the implication of which is that, for some, alternative negotiating unit structures may be contemplated.

This analysis leads us to the conclusion that the statutory definition of public employers merely specifies the entities that are subject to the Taylor Law, and that it has no necessary implications for negotiating unit structure. Those implications flow from the second standard of §207.1, as explained in County of Clinton, supra. However, while there are no officials of (1) a county and (2) a sheriff/county joint employer who function at the level of a negotiating unit comprising the employees of both entities, this is not necessarily so for special or improvement districts.[11/] Clearly, it is not so for the four districts in the instant proceeding. Here, the second Taylor Law standard for the definition of negotiating units does not preclude the definition of units which integrate town and district employees.

11/It may or may not be so for special or improvement districts, the governance of which is in the hands of a board of commissioners.

Inasmuch as the petition alleges alternative grounds for excluding persons who work for the districts from the unit of Town employees represented by CSEA which were not addressed by the Director, we remand this matter to him to consider those allegations.

NOW, THEREFORE, WE ORDER that the petition herein be, and it hereby is, remanded to the Director for further processing.

DATED: April 15, 1986
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY,

Respondent,

-and-

CASE NO. U-7713

WILLIAM J. SORRENTINO,

Charging Party.

NEW YORK CITY TRANSIT AUTHORITY, ALBERT C. COSENZA, ESQ. (GEORGE S. GRUPSMITH, ESQ., of Counsel), for Respondent

AGULNICK & GOGEL (WILLIAM A. GOGEL, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

William J. Sorrentino filed the charge herein on September 25, 1984. It alleges that the New York City Transit Authority (Authority) violated §209-a.1(a) and (c) of the Taylor Law in that it instituted disciplinary charges against Sorrentino in retaliation for his exercise of rights protected by the Taylor Law, and that it prevented him from photographing suspected unsafe conditions at one of the Authority's facilities. The Administrative Law Judge (ALJ) found that the Authority has committed an improper practice as charged, and the matter comes to us on the exceptions of the Authority.

FACTS

Sorrentino was a delegate to the Police Benevolent Association (PBA), the negotiating representative of police officers at the Authority's District 34. In that capacity he inspected a new facility to which District 34 offices were being located. Concluding that there were unsafe conditions at the facility, he notified the desk officer and other officers of District 34 and they advised him that corrective steps were being taken. However, three weeks later, identifying himself as a PBA delegate, Sorrentino notified the New York City Fire Department of these alleged unsafe conditions and he requested that a fire inspection be conducted.

Identifying Sorrentino as the complainant, the Fire Department inspected District 34, but it did not substantiate his complaints. The desk officer then initiated disciplinary charges against Sorrentino. The first specification of the disciplinary charge was that Sorrentino's conduct had violated the manual of the New York City Transit Police Department by engaging in "[c]onduct tending to create adverse criticism". The second specification was that he further violated the manual in that he "[f]ailed to promptly

and properly report accident prone conditions".[1/] After a hearing, the first specification of the charge was dismissed and the second sustained, with the recommended penalty of a two-day suspension.

While the disciplinary charge was pending, Sorrentino, on the advice of his attorney, attempted to photograph the conditions at District 34 about which he had complained. He was ordered to refrain from taking these pictures and warned that disciplinary action would follow.

The improper practice charge merely complains about the disciplinary action taken against Sorrentino related to the fire department inspection and the picture-taking incident. Nevertheless, the ALJ admitted evidence of other confrontations between Sorrentino -- acting in his capacity as PBA delegate, and later as a PBA trustee -- and the Authority. The evidence indicates a series of actions by Sorrentino followed by retaliatory reactions on the part of several supervisors. The ALJ noted that these other incidents evidenced animus towards Sorrentino by reason of his exercise of protected activities.

In its exceptions, the Authority objects to any consideration of a grievance filed by Sorrentino in late 1983

1/The relevant provision of the manual requires that a police officer who discovers accident or crime prone conditions should report such conditions to the desk officer.

on the ground that the event transpired before Sorrentino was assigned to District 34 and there is no proof that Sorrentino's supervisors at District 34 were aware of it. Thus, according to the Authority, that event cannot be used to establish that Sorrentino's supervisors at District 34 were motivated by animus when they filed or threatened charges against him for his activities on behalf of PBA in connection with the fire department inspection or the picture-taking incident. The Authority also objects to consideration of events which transpired after the fire inspection and picture-taking incidents on the ground that they have no probative value concerning the issue of motivation at the time of the two incidents that are the subject of the improper practice charge. The Authority argues that there is no evidence that these two incidents, standing alone, were improperly motivated, in that Sorrentino did violate the police department manual and the Authority was privileged to bring disciplinary charges against him for such conduct.

DISCUSSION

We agree with the Authority that the event recited by the ALJ involving a grievance filed by Sorrentino before he was assigned to District 34 should not be considered in determining whether the supervisory employees at District 34 were improperly motivated in bringing charges against

Sorrentino. There is no evidence that they had knowledge of that event. With respect to the events that transpired after the bringing of the charges, we find that they establish animus against Sorrentino related to his activities on behalf of PBA at the time when they occurred. However, they do not establish conclusively that the animus existed at the time when the disciplinary charges were brought against Sorrentino because that animus may have developed thereafter. Nevertheless, they are not irrelevant to the issue of the state of mind of Sorrentino's supervisors when they brought the disciplinary charge. Logic dictates that supervisory personnel of the Authority who took retaliatory action against Sorrentino for engaging in activities on behalf of PBA at a later time may well have been ill-disposed towards his filing a complaint with the fire department and attempting to photograph allegedly unsafe conditions, both on behalf of PBA. Thus, it is useful in helping us to resolve any doubts that we may have as to the Authority's motivation in bringing the disciplinary charge.

Actually, there is little reason for any such doubt. It is clear, on the face of the disciplinary charge, that the Authority's intention in bringing the charge was to interfere with Sorrentino's bringing of complaints to the fire department and to restrain and coerce him for doing so. It is equally clear that the bringing of the charge

discriminated against him for the purpose of discouraging that activity. Thus, if Sorrentino's complaint to the fire department on behalf of PBA is protected by the Taylor Law, the Authority's bringing of the disciplinary charge was improperly motivated. For the reasons specified in the ALJ's decision we find that Sorrentino's complaint to the fire department was protected by the Taylor Law.[2/] Further, for the reasons specified by the ALJ, we also find that Sorrentino's attempt to photograph the unsafe conditions at District 34 were protected by the Taylor Law.

NOW, THEREFORE, WE AFFIRM the decision of the ALJ and WE ORDER the Authority to:

1. Withdraw the disciplinary charges preferred against William Sorrentino relating to his complaint to the fire department, and any disciplinary penalty related thereto;

[2/] It is irrelevant that with respect to conduct not protected by the Taylor law the Authority may be able to restrict a unit employee from filing complaints about it that may create adverse criticism. Compare Board of Education of Grand Island v. Helsby, 32 A.D.2d 493, 4 PERB ¶4716 (4th Dep't 1971), aff'd, 32 N.Y.2d 660, 6 PERB ¶7004 (1973). We find that the Authority's reliance upon Western Regional Off-Track Betting Corporation, 15 PERB 3078 (1982) is not helpful to it. In that case, the statements made by the unit employee were not protected by the Taylor Law in that they did not involve terms or conditions of employment. Finally, with respect to the allegation in the disciplinary charge that Sorrentino failed to notify the desk officer of the unsafe condition, the evidence before us is to the contrary.

2. Cease and desist from prohibiting William Sorrentino or any PBA representative from investigating conditions affecting unit employees' safety at Authority facilities, or threatening discipline therefor;

3. Immediately remove and destroy all reports and documents referring to Sorrentino's involvement in the fire inspection and picture-taking incidents which are maintained in Authority files;

4. Cease and desist from interfering with, restraining, coercing or discriminating against William Sorrentino or any PBA representative for exercising rights protected by the Taylor Law;

5. Sign and post the attached notice at all locations customarily used to post communications to unit members at District 34.

DATED: April 15, 1986
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Patrolmen's Benevolent Association that the New York City Transit Authority:

1. Will withdraw the disciplinary charges preferred against William Sorrentino relating to his complaint to the fire department, and any disciplinary penalty related thereto;

2. Will not prohibit William Sorrentino or any PBA representative from investigating conditions affecting unit employees' safety at Authority facilities, or threaten discipline therefor;

3. Will immediately remove and destroy all reports and documents referring to Sorrentino's involvement in the fire inspection and picture-taking incidents which are maintained in Authority files;

4. Will not interfere with, restrain, coerce or discriminate against William Sorrentino or any PBA representative for exercising rights protected by the Taylor Law.

New York City Transit Authority

Dated ..... **By** .....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

10324

#2E-4/15/86

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NASSAU COUNTY LOCAL 830, CIVIL SERVICE EMPLOYEES ASSOCIATION,

Respondent,

-and- CASE NO. U-8434

PAULA R. HAUGEN,

Charging Party.

PAULA R. HAUGEN, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Paula Haugen to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her charge against Nassau County Local 830, Civil Service Employees Association (CSEA) on the ground that it is not timely. The charge alleges a violation by CSEA of its duty of fair representation in connection with a grievance relating to Haugen's dismissal by the Board of Cooperative Educational Services which employed her.

The alleged violation is presented in narrative form which recites various actions of CSEA from April 15, 1985 through October 28, 1985. As the charge was not clear, the Administrative Law Judge (ALJ) assigned to the case asked Haugen to clarify it. She did so in an eleven-page letter which expanded the narrative in the charge. Some of the facts alleged therein occurred more than four months before the

charge was filed, others within that four-month time frame.[1/] Some of the conduct recited may constitute an improper practice. Other aspects of the conduct could not.

The ALJ was still not satisfied that the charge was sufficiently specific and asked her for further clarification. More particularly, he asked Haugen to specify the conduct of CSEA which constituted the claimed violation. Haugen responded in a letter which pinpointed the conduct she was complaining about. Those events all occurred more than four months prior to her filing of the charge. Accordingly, the Director determined that the charge was not timely and he dismissed it.

Reviewing the record, we find that the narrative contained in the original charge and in Haugen's first letter of explanation contains allegations of facts which occurred within four months of the charge, some of which may constitute an improper practice.[2/]

1/Section 204.1(a)(1) of our Rules of Procedure permits the filing of an improper practice charge within four months of the conduct complained about.

2/Section 204.2(a) of our Rules of Procedure requires the processing of a charge if the facts alleged may constitute an improper practice. We sympathize with the reluctance of the Director to process the charge on the basis of a long, nonspecific narrative which contains many allegations of fact merely because some of those allegations may constitute a violation. Ordinarily we would concur in his determination to rely upon the charging party's specific delineation of what it is that she is complaining about. Here, however, charging party appears pro se and is obviously unsophisticated in matters of law and the procedures of this Board. We are therefore unwilling to hold her to normal standards of precision in the drafting of a charge.

NOW, THEREFORE, WE REVERSE the decision of the Director and remand the matter herein for further processing.

DATED: April 15, 1986
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

#3A-4/15/86

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF CROTON-ON-HUDSON,

Employer,

-and- CASE NO. C-2994

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

-and-

WESTCHESTER LOCAL 860, CSEA,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Parks Foreman, H.M.E.O., MEO San 1, MEO San 2, MEO Street, Laborer San 1, Laborer San 2, Laborer Street 1, Laborer Street 2, Mechanic, Water Main. Man Gr. 1, Water Laborer, Main. Man Gr. 2, Intermediate Typist Account Clerk, Intermediate Account Cl/Typist, Caretaker, Parking Enforcement Officer, Court Clerk, Bookkeeping Machine Operator and all other similar positions.

Excluded: All other titles.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: April 15, 1986
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

10329

#3B-4/15/86

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF CATTARAUGUS, ALLEGANY, ERIE AND WYOMING COUNTIES,

Employer,

-and-

CASE NO. C-3035

CATTARAUGUS, ALLEGANY, ERIE, WYOMING BOCES ADMINISTRATIVE AND STAFF SPECIALISTS ASSOCIATION,

Petitioner,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Cattaraugus, Allegany, Erie, Wyoming BOCES Administrative and Staff Specialists Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All Program Managers, Supervisors, Building Facilitators, Coordinators, Assistant Program Managers and Assistant Directors.

Excluded: District Superintendent, Assistant District Superintendent, Treasurer/ Administrative Assistant for Business, Accountant/Assistant Treasurer, Director - Labor Relations and all Directors.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Cattaraugus, Allegany, Erie, Wyoming BOCES Administrative and Staff Specialists Association and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: April 15, 1986
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

10331